SUPREME COURT NO. 84554-9
COURT OF APPEALS NO. 38705-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

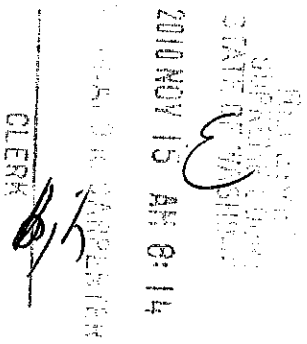
STATE OF WASHINGTON,

Respondent,

v.

JAMES L. GRIFFIN,

Petitioner.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David L. Edwards

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ARGUMENT

1. RAPID RECIDIVISM IS AN AGGRAVATOR THE STATE MUST PROVE IN ACCORD WITH THE CONSTITUTIONAL GUARANTEES AFFORDED UNDER BLAKELY v. WASHINGTON.[1]

Whether the current offense was committed shortly after release from incarceration is a fact that must be proven to a jury beyond a reasonable doubt. State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).[2] In rejecting the state's argument that the rapid recidivism aggravator was encompassed within the prior conviction exception of Apprendi v. New Jersey,[3] this Court in Hughes reasoned:

> Rapid recidivism was recognized as a valid aggravating factor in State v. Butler, 75 Wn. App. 47, 53-54, 876 P.2d 481 (1994). Amicus Curiae WAPA cites Butler as its only support for rapid recidivism as a valid aggravating factor. It argues that the only factual findings related to that aggravating factor are Hughes' prior conviction and his current offense, both of which a trial court is authorized to find under Blakely. . . .
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> Butler clearly states, however, that if rapid recidivism were solely based on prior convictions, an

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[1] Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[2] At the time the petition for review was filed, undersigned counsel did not realize this issue was resolved in Hughes.

[3] Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 403 (2004).

> exceptional sentence could not be based on that factor, as the presumptive sentence ranges already consider prior convictions. Butler, 75 Wn. App. at 53-54, 876 P.2d 481. In fact, the Court of Appeals explicitly stated that "[t]he trial court's findings here are distinguishable from mere criminal history." Id. at 54, 876 P.2d 481. In finding that aggravating factor, the court actually considered the "especially short time period between prior incarceration and reoffense." Id. The court further stated that an exceptional sentence is justified where the circumstances show "a greater disregard for the law than otherwise would be the case" and found that the defendant's immediate reoffense reflected that disdain.
>
> . . .
>
> The Supreme Court has made an exception to the jury requirement *only* for prior convictions. The findings at issue here involve new factual determinations and conclusions, such as the defendant's disregard for the law, which are not properly made by the trial court following Blakely.

Hughes, 154 Wn.2d at 142 (emphasis in original).

Because Blakely protections do apply to the aggravator at issue here, this case squarely presents the issue raised in the petition for review: whether the rapid recidivism aggravator must be based on facts established beyond a reasonable doubt *in accordance with the rules of evidence*.

2. THE DUE PROCESS CLAUSE OF THE WASHINGTON CONSTITUTION REQUIRES THE STATE TO PROVE RAPID RECIDIVISM BEYOND A REASONABLE DOUBT IN ACCORD WITH THE RULES OF EVIDENCE.

As the state may point out in its briefing, numerous state and federal courts have held that application of relaxed evidentiary safeguards at the penalty phase of capital sentencing hearings does not offend due process. See e.g. State v. Scott, 286 Kan. 54, 100-101, 183 P.3d 801, 834 (2008) ("it appears that every other court to consider the question has rejected Scott's contention [that aggravating circumstances be proved only by the rules of evidence[.]") (citing cases); United States v. Fell, 360 F.3d 135 (2d Cir. 2004). These holdings are in keeping with the "all relevant evidence" doctrine. See Jurek v. Texas, 428 U.S. 262, 276, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976) ("What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."). The state may argue that because relaxed evidentiary standards at capital sentencing hearings do not offend due process, relaxed evidentiary standards at aggravated sentencing hearings (where less than death is involved) likewise does not offend due process.

Any such argument should be rejected, however, as the Washington constitution, contrary to its federal counterpart, provides for application of the rules of evidence in capital sentencing hearings. The reason for providing this safeguard in capital sentencing hearings – the concept of fairness – applies equally to aggravated sentencing hearings.

This Court first rejected the argument that aggravating factors need not be proven according to the rules of evidence in 1984, in State v. Bartholomew II, 101 Wn.2d 631, 683 P.2d 1079 (1984). While liberal reception of mitigating information had always been allowed under federal law, this Court noted the United States Supreme Court (at the time) had not yet decided whether this same principle applied to aggravating information. Bartholomew II, 101 Wn.2d at 636-637.

Regardless of the Supreme Court's anticipated interpretation of the federal due process clause, however, this Court noted relaxed evidentiary safeguards for aggravating factors would offend our state constitution:

> The federal constitution only provides minimum protection of individual rights. Accordingly, it is well established that decisions from the federal courts "do not limit the right of state courts to accord ... greater rights." . . .

We, therefore, hold that the due process and cruel punishment provisions of this state's constitution are offended by the provisions of RCW 10.95.060(3) in any case involving capital punishment by (1) allowing the introduction of any evidence regardless of its admissibility under the Rules of Evidence, including hearsay evidence, and (2) allowing evidence of defendant's prior criminal activity regardless of whether defendant was charged or convicted as a result of such activity.

Since the death penalty is the ultimate punishment, due process under this state's constitution requires stringent procedural safeguards so that a fundamentally fair proceeding is provided. Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article 1, section 14 of the state constitution.

We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability. The rules of this court concerning admissibility of evidence are premised on allowing evidence which is trustworthy, reliable, and not unreasonably prejudicial. See ER 403. The purpose of the Rules of Evidence is to afford any litigant a fair proceeding. See ER 102.

It makes no sense to afford these protections to one charged with a lesser crime but then suspend them in a capital case. We will not do so, for this would place a defendant facing the death penalty in the perilous position of having to rebut potentially unreliable or unreasonably prejudicial evidence before a jury that has already convicted him of aggravated murder. To suspend these protections which are afforded all other criminally charged defendants at such a critical phase of a capital case is contrary to the reliability of evidence standard in the due process clause of our state constitution. Const. art. 1, § 3.[4]

Bartholomew II, 101 Wn.2d at 639-641.

This Court affirmed its holding in Bartholomew II 17 years later in State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001). At Clark's capital sentencing hearing, the state had been allowed to elicit evidence – over vigorous defense objection – underlying Clark's prior 1998 false imprisonment charge, i.e. that the victim was four years old and known to Clark. Clark, 143 Wn.2d at 743. On appeal to this Court, Clark argued the evidence was plainly inadmissible under Bartholomew II, because it was unfairly prejudicial. Clark, 143 Wn.2d at 777-778. In response, the state invited the Court to overrule Bartholomew II. Id. at 778.

This Court declined the state's invitation, reiterated its commitment to "that constitutional guarantee of fairness," and maintained that: "The admission by the court and consideration by the jury of aggravating factors, . . . must be restricted to meet the evidentiary, and state and federal constitutional standards we have articulated." Clark, 143 Wn.2d at 780. This Court agreed with Clark that the challenged evidence "should have been excluded from evidence even if otherwise admissible[5] because it was unduly

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[4] Const. art. 1, § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law."

[5] By "otherwise admissible," this Court was referring to the state's first argument, also rejected by this Court, that the evidence was admissible under State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995). In Pirtle, this Court considered

prejudicial under the quasi 403 analysis Bartholomew II engenders." Clark, 143 Wn.2d at 782.

Thus, it has been the law in Washington for the last 26 years that Washington's due process clause provides broader protection at capital sentencing hearings – including the rules of evidence – than its federal counterpart. The reason the Washington constitution has been interpreted as providing for broader protection in this context applies equally to aggravated sentencing hearings, where increased incarceration (as opposed to death) is at stake.

It is just as offensive to the concept of fairness to allow at an aggravated sentencing hearing evidence which lacks reliability as it is to allow such evidence at a capital sentencing hearing. In both scenarios, the defendant is potentially facing far greater punishment than the law typically allows. As this Court also stated in Bartholomew II, "[I]t makes no sense to afford these protections

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exactly how much data about a prior conviction are admissible under Bartholomew II, which limited evidence of nonstatutory aggravating factors to a defendant's criminal record, evidence that would have been admissible at the guilt phase, and evidence to rebut matters raised in mitigation by the defendant. Bartholomew II, 101 Wn.2d at 642. The Pirtle Court affirmed the lower court's admission of the charging document, reasoning it did not cause Pirtle undue prejudice, as: the charging document "did little more than to inform the jury that this assault resulted in substantial bodily harm and involved the use of a deadly weapon. . . . [The information] simply stated the particular elements of the crime which was the basis for the conviction." Pirtle, 127 Wn.2d at 670-71.

to one charged with a lesser crime but then suspend them in a capital case." Bartholomew II, 101 Wn.2d at 640. Similarly, it makes no sense to afford these protections to Griffin with respect to his underlying crime but then suspend them at a critical phase, where he is subject to increased punishment. From a fairness perspective, the increased liberty interest at stake requires more due process protection not less.

Just as this Court has recognized due process requires the state to prove aggravators in capital sentencing hearings in accord with the rules of evidence, this Court should recognize due process likewise requires the state to prove aggravators in aggravated sentencing hearings in accord with the rules of evidence. To hold otherwise "is contrary to the reliability of evidence standard embodied in the due process clause of our state constitution." Bartholomew II, 101 Wn.2d at 641.

Where this Court has "already determined in a particular context the appropriate state constitutional analysis under a provision of the Washington State Constitution," it is unnecessary to provide a threshold Gunwall analysis.[6] City of Woodinville v.

[6] State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986) articulates standards to determine when and how Washington's constitution provides different protection of rights than the United States Constitution. Id. at 58, 720 P.2d 808.

Northshore United Church of Christ, 166 Wn.2d 633, 641, 211 P.3d 406 (2009) (quoting State v. Reichenbach, 153 Wash.2d 126, 131 n.1, 101 P.3d 80 (2004)). A strict rule that courts will not consider state constitutional claims without a complete Gunwall analysis could return briefing into an antiquated writ system where parties may lose their constitutional rights by failing to incant correctly. Gunwall is better understood to prescribe appropriate arguments: if the parties provide argument on state constitutional provisions and citation, a court may consider the issue. This is especially true where, as in many areas, the special protections of our state constitution have been previously recognized by this court.

The special protections of our state constitution in the context of sentencing aggravators have been previously recognized by this Court. This Court's decisions in Bartholomew II and Clark compel application of the rules of evidence at aggravating sentencing hearings.

C. CONCLUSION

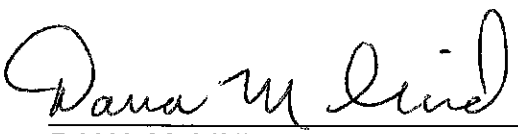
Although Griffin waived his right to a jury trial on the rapid recidivism aggravating factor, he did not waive his right to proof beyond a reasonable doubt. In Washington, proof beyond a reasonable doubt must be established according to the rules of

evidence. Because the state failed to lay a proper foundation for the hearsay evidence offered as proof of the rapid recidivism aggravating factor, Griffin's exceptional sentence should be reversed.

Dated this 12TH day of November, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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No. 84554-9

Certificate of Service by Mail

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Containing a copy of the Supplemental Brief of Petitioner, re James Griffin Cause No. 84554-9, in the Supreme Court, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

John Sloane
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11-12-10
Date
Done in Seattle, Washington